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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/900,647	07/07/2001	Dale R. Lovercheck	ANAL-VIT	6584

7590

01/08/2003

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EXAMINER

HUI, SAN MING R

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 01/08/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/900,647

Applicant(s)

LOVERCHECK, DALE R.

Examiner

San-ming Hui

Art Unit

1617

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 16 December 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See attachment.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.Claim(s) objected to: None.Claim(s) rejected: 26-30,33-35 and 37-46.Claim(s) withdrawn from consideration: None.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____

RUSSELL TRAVERS
PRIMARY EXAMINER
GROUP 1200

ADVISORY ACTION

Applicant's amendments filed December 16, 2002 have been entered. The cancellation of claims 32 and 47 is acknowledged.

The outstanding rejection under 35 USC 112, second paragraph is withdrawn in view of the cancellation of claim 32.

Claims 26-30, 33-35 and 37-46 are pending.

Continuation of 5):

Applicant's rebuttal arguments averring the cited prior art's failure to teach the intended uses recited in the claims herein have been fully considered but they are not persuasive. The instant method claims are drawn to a method comprising enclosing the herein claimed agents (i.e., ibuprofen and vitamin C) into an enclosure. The instant claims are not drawn to treatment of certain diseases. Please also note that products of identical chemical composition cannot have mutually exclusive properties. A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada* 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). See MPEP 2112.01. In the instant case, ibuprofen and vitamin C are the preferred elected compounds herein; they then must possess the herein claimed properties recited in the broadest claim, absent evidence to the contrary.

Applicant's remarks regarding Yeh et al. as nonanalogous art are believed have been addressed above. The cited prior art clearly provides the motivation to enclose

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the herein elected compounds, ibuprofen and vitamin C, into an enclosure such as a container, absent evidence to the contrary.

Applicant's remarks regarding the cited prior art's failure to teach "nutritional supplements which are not adapted to aid in or contribute to discomfort relieving function of a discomfort reliever or to aid in or contribute to reducing side effects of the discomfort reliever" have been considered, but are not found persuasive. As discussed above, products of identical chemical composition cannot have mutually exclusive properties. A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada* 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). See MPEP 2112.01. Ibuprofen and vitamin C are the preferred elected compounds herein; they then must possess the herein claimed properties recited in the broadest claim, absent evidence to the contrary.

Applicant's rebuttal arguments averring the cited prior art being teaching away have been considered, but are not found persuasive. Applicant has not pointed out exactly where the cited prior art teaches away from the instant invention. Applicant's arguments are merely based on the alleged lack of teachings from the cited prior art. This is not teaching away. Teaching away has to be positive statements presented in the cited prior art that will steer away one of ordinary skill in the art to arrive at the same invention as the instant inventor. There is no teaching away in the cited prior art. Possessing the teachings of the cited prior art, one of ordinary skill in the art would have

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been motivated to enclose the elected compounds, ibuprofen and vitamin C, into an enclosure such as a container, absent evidence to the contrary.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As discussed before, the cited prior art clearly renders the invention obvious. Possessing the teachings of the cited prior art, one of ordinary skill in the art would enclose the elected compounds, ibuprofen and vitamin C, into an enclosure such as a container, absent evidence to the contrary.

No unanswered rebuttal argument is seen herein.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to San-ming Hui whose telephone number is (703) 305-1002. The examiner can normally be reached on Mon 9:00 to 1:00, Tu - Fri from 9:00 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan, PhD., can be reached on (703) 305-1877. The fax phone numbers for the organization where this application or proceeding is assigned

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are (703) 308-4556 for regular communications and (703) 308-4556 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

San-ming Hui
January 2, 2003


RUSSELL TRAVERS
PRIMARY EXAMINER
GROUP 1230